

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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528

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,779

UNITED STATES OF AMERICA,

Appellee

v.

STEPHEN A. TUTTLE,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

I.

Whether the Government presented sufficient evidence in its case in chief involving a charge of Grand Larceny, as concerns the value of the merchandise involved, to permit the trial court to submit the case to the jury?

II.

Whether a trial court should instruct the jury on the lesser included charge of Assault where there is a serious question concerning the nature of the assault and there is question that a complainant is in fact a police officer to support the Government's main charge of Assault on a Member of the Police Force?

This case has not previously been before this Court under any title.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Stephen A. Tuttle, was charged with a two count indictment of Grand Larceny and Assault on a Member of the Police Force pursuant to 22 D.C. Code Section 2201 and 22 D.C. Code Section 505(a) respectively. Appellant was found guilty on both counts by a jury in the United States District Court for the District of Columbia on September 23, 1969. On November 20, 1969, Appellant was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty months to five years on count one (Grand Larceny)

and ~~twenty~~ months to five years on count two (Assault on a Member of the Police Force), said sentences to run concurrently. An appeal was noted on November 20, 1969. The jurisdiction of this Court is proper under 28.U.S. Code, Section 1291.

REFERENCES TO RULINGS

None.

STATEMENT OF THE CASE

Appellant was found guilty on September 23, 1969 in Criminal No. 1059-69 on count 1 (Grand Larceny) and count 2 (Assault on a Member of the Police Force) pursuant to 22 D.C. Code, Section 2201 and 22 D.C. Code, Section 505(a) respectively. Said trial was before a jury in the United States District Court for the District of Columbia, the Honorable John Lewis Smith, Jr. presiding. On November 20, 1969, the Appellant was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty months to five years on count one (Grand Larceny) and twenty months to five years on count two (Assault on a Member of the Police Force), said sentences to run concurrently. This appeal is taken from that order.

STATEMENT OF FACTS

On January 16, 1969, Detective Robert E. Smythe and Detective Patrick Lanigan assigned to the Criminal Investigation Division of the Metropolitan Police Department were patrolling in the vicinity of Seventh and F Streets, Northwest, Washington, D.C. in an unmarked police cruiser

with Detective Lanigan behind the wheel (Tr. 26-27).

Detective Smythe testified at the trial that he first saw the appellant Tuttle coming out of the F Street entrance of the Hecht Department Store carrying what appeared to be ladies coats in his arms with the sales tickets attached to them (Tr. 27-28).

Detective Lanigan's observation was in substance the same as that of his partner concerning the Appellant leaving the F Street entrance of the Hecht Company with the coats in arm (Tr. 42-43).

The testimony revealed that Tuttle crossed F Street behind the police cruiser occupied by Smythe and Lanigan and Detective Lanigan made a U turn to follow Tuttle, who was on foot (Tr. 28). At Eighth and G Streets, Northwest, the detectives pulled alongside the Appellant and Detective Smythe beckoned him to stop (Tr. 29, Tr. 43).

Failing to heed Detective Smythe's warning to stop, Detective Lanigan turned on the red light and siren on the cruiser (Tr 29, Tr. 44). The detectives caught up to Tuttle at approximately mid block of Eighth Street, Northwest at which time the Appellant threw the coats in the direction of the police cruiser which hit the auto

and then fell to the ground (Tr. 29-30, Tr. 44).

Detective Smythe got out of the police cruiser and gave chase on foot pursuing the Appellant north on Eighth Street (Tr. 30, Tr. 44). The chase on foot continued across Eighth Street to a parking lot, which is located in the 700 Block of Eighth Street and leads through to Ninth Street, Northwest (Tr. 30, Tr. 44).

On direct examination, Detective Smythe testified that as he was entering the parking lot at the Eighth Street entrance and on the heels of the Appellant, Tuttle turned around with his arm and knocked the detective off his feet causing him to fracture the ring finger of his left hand (Tr. 30).

The Appellant continued running through the parking lot to Ninth Street and Smythe continued to give chase. On Ninth Street, Detective Lanigan had managed to position himself so as to slow Tuttle down, whereupon Tuttle turned around and started running South or back toward the Ninth Street entrance to the parking lot. At this point, Detective Smythe tackled Mr. Tuttle, who was then apprehended (Tr. 30-31).

On cross examination, Detective Smythe testified that upon entering the parking lot at the Eighth Street

entrance and approximately five or ten feet onto the parking lot itself, this was the first point of contact between himself and the Appellant. The detective indicated that the right hand of Tuttle shot back at him (Tr. 34).

According to Detective Smythe, Tuttle struck him across the arms. The detective described the blow as a glancing one, which knocked him off balance and unto the ground (Tr. 35).

He further testified that as he fell, his left hand hit a metal pole, which was described as four inches in diameter and three or four feet high (Tr. 35-36). Apparently, the pole was the proximate cause of the fractured finger sustained by Detective Smythe.

Mr. Tuttle did not push, kick or grab the Detective; but rather the episode was described by Smythe as an effort to shake him (Detective Smythe) off (Tr. 37). Prior to the above alleged contact and fall of Smythe, the two men had engaged in a dodging movement back and forth on Eighth Street and at one point Tuttle squared off at Detective Smythe; but without any contact being made (Tr. 37).

The lighting in the area was described as getting dark or dusk (Tr. 40).

Detective Patrick Lanigan was the second police officer who testified in behalf of the Government. He basically confirmed the time and place of the incident already testified to by Detective Smythe indicating that the chase of Tuttle took place on January 16, 1969 at approximately 6:30 P.M. (Tr. 41). He testified of seeing the Appellant leave the F Street entrance of the Hecht Store and traced the movements of Tuttle until his partner, Detective Smythe, alit from the car and gave chase on foot into the parking lot entrance in the 700 block of Eighth Street (Tr. 44).

Detective Lanigan described his movements in the police cruiser in the parking lot until he alit from the vehicle to assist Detective Smythe in apprehending and handcuffing Tuttle on Ninth Street (Tr. 46).

The three coats were recovered by Detective Smythe at Eighth Street (Tr. 31, Tr. 46-47).

Detective Lanigan testified on direct examination that at the entrance of the parking lot at Eighth Street, he observed Appellant grab Detective Smythe and throw him to the ground (Tr. 47). Detective Smythe had previously testified that Tuttle had not grabbed him nor thrown him

down; but rather that he had flicked his arm back with the apparent intention of shaking the detective off (Tr. 37).

Again, on cross examination, Detective Lanigan, referring to the Eighth Street entrance of the parking lot (which was indicated by an X on a blackboard diagram) testified that Tuttle had a hold of his partner and threw him to the ground (Tr. 48-49). Detective Lanigan indicated that the confrontation was face to face at the point of the X and that both men were going round and round (Tr. 49). The testimony of Detective Lanigan was contrary to that offered by Detective Smythe, which indicated the action of Tuttle was a flicking motion backward (Tr. 37).

Detective Lanigan further testified that the Appellant took a fist swing at Smythe at the point of the X (the Eighth Street entrance to the parking lot) and also prior to the point of the X while Smythe and Tuttle were dodging each other on Eighth Street (Tr. 50). Detective Smythe had testified that at no time did Tuttle strike him (Tr. 37).

Lanigan indicated that at the time of the confrontation at the point of the X, he was stationed in his cruiser on the parking lot and was approximately fifteen to twenty

feet away from the Appellant and Detective Smythe (Tr. 51).

In support of the Grand Larceny count of the indictment involving the theft of the aforementioned coats, the Government called Mrs. Margaret Reid, a buyer for the Hecht Company. She identified the coats in question and stated on direct examination that Hecht had originally sold the coats for \$45.00 a piece; but that on January 16, 1969, the coats had been marked down to sell at \$34.00 per coat (Tr. 17).

On cross examination, Mrs. Reid testified that she and her boss, a Stanley Fishman, decided that the sale price of the coats should be \$34.00 in that they thought that said price would move the coats off the rack (Tr. 17-18).

She further testified that the original purchase price paid the manufacturer per coat was \$25.00 (Tr. 20).

Finally, the Government called a Vivian Emory, who was employed at the Hecht Store as a store detective (Tr. 21). She was introduced by the Government to prove the coats in question had not been paid for by Mr. Tuttle. Mrs. Emory explained that each item of merchandise sold in the store had a three part ticket. One part of the

ticket was to be torn off by the sales clerk and placed in a stub box, the second part was to go to the auditing department and the third part of the ticket was to go to the buyer apparently as a check for existing inventory in stock (Tr. 23). From Mrs. Emory's inspection of the coats and the price tags attached thereto and further checking the stub box, the coats had not been sold in a way and manner as described (Tr. 24).

After the Government had rested its case, the defense moved for a judgment of acquittal on both counts of the indictment. As to the Grand Larceny count, the defense argued that the Government had produced insufficient evidence proving the value of the coats in question to be \$100.00 or more and also moved for a judgment of acquittal on the second count of the indictment, assault on a member of the police force, on the basis that there was insufficient evidence to indicate how Detective Smythe was assaulted. The respective motions were denied by the Court (Tr. 55).

For tactical reasons, the Appellant did not take the stand and the defense rested its case.

The Government asked for a special instruction on recently stolen property from the Junior Bar Criminal

Jury Instructions Red Book. The Government also made a special request that the flight instruction be given. The recently stolen property instruction request was granted and the flight instruction request was denied (Tr. 56).

The defense made a special request from the Red Book covering No. 53 (Assault) and No. 74 (Petit Larceny) as lesser included offenses of Assault on a Member of the Police Force and Grand Larceny respectively. The Court denied the defense request as to simple assault as a lesser included offense and granted the petit larceny instruction request as a lesser included offense.

The jury was instructed by the Court on September 23, 1969 and deliberated from 11:12 A.M. until 12:00 noon, whereupon the jury returned a verdict of guilty as to both counts of the indictment.

STATEMENT OF POINTS

I.

The lower court erred by denying the defense motion for a judgment of acquittal at the conclusion of the Government's case, as to the Grand Larceny count of the indictment, in that there was no reasonable basis to conclude that the Government had proved the value of the coats to be \$100.00 or more.

II.

The lower court erred by denying the defense request to instruct the jury on assault as a lesser included offense of Assault on a Member of the Police Force.

SUMMARY OF ARGUMENT

Where it is adduced in the course of a jury trial that the value of merchandise involving a charge of Grand Larceny is a conditional valuation and is part and parcel of an overall policy of a department store to move the said merchandise and liquidate its inventory, it should be incumbent on the trial court to grant the defense's motion for a judgment of acquittal. Where the value of merchandise is qualified and conditional, submission of the case to the jury, erroneously permits the jury to act on what would necessarily be only surmise and conjecture, without sufficient evidence to find the accused guilty beyond a reasonable doubt.

II.

Where, in the course of a trial, testimony is offered by police officers, which testimony is contradictory in determining how and in what way one of the two police officers were assaulted and further where it is also determined that said police officers were in street clothes and in an unmarked police cruiser thereby casting doubt on whether there was

meaningful communication between the officers and the accused indentifying themselves as police officers, it is error under such circumstances for the trial court to deny the defense's request for an instruction on Assault as a lesser included offense of Assault on a Member of the Police Force.

ARGUMENT

I

THE COURT BELOW ERRED BY DENYING THE DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE AS TO THE GRAND LARCENY COUNT OF THE INDICTMENT IN THAT THERE WAS NO REASONABLE BASIS TO CONCLUDE THAT THE GOVERNMENT HAD PROVED THE VALUE OF THE COATS IN QUESTION TO BE \$100.00 OR MORE.

"In the case of common articles having a market value, the courts have usually rejected original cost and any special value to the owner personally and have declared the proper criterion to be the price which the subject of the larceny would bring in the open market, its "market value" or its "reasonable selling price" at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny." 3 Wharton's Criminal Law and Procedure, Section 449 at page 73 (1957 Edition).

What can be gleaned from the above statement is that the selling price is usually determinative of the value of the merchandise, which is the subject of the Grand Larceny, without regard to wholesale value to the owner. In the instant case, each coat was selling at \$34.00 per coat or the aggregate retail price for the three coats was \$102.00.

The doctrine of value was further explored in

the case of People v. Irrizari, 5 NY 2d. 142, 182 NYS 2d. 361, 156 N.E. 2d. 69 (1959). In this case, the New York court adopted the substance of the statement from Wharton's supra. In brief, the court held that in determining value, the wholesale or replacement cost was not significant. What was determinative was what the goods were retailing for at the time of the theft unless it could be shown by the defendant that such list price was much higher than the price paid for similar merchandise in the vicinity.

However, the court was quick to point out that the selling price was not necessarily determinative if qualifying circumstances were shown.

In the instant case, the coats in question were originally purchased wholesale by the Hecht Company for \$25.00 per coat, or \$75.00 for all three. The coats were then retailed at \$45.00 a piece or \$135.00 for all three. Prior to January 16, 1969, the date of the purported larceny of the coats by the Appellant, the coats were reduced in retail price from \$45.00 a piece to \$34.00 per coat or \$102.00 for all three. Therefore, on January 16, 1969, the coats were selling in the open market for \$102.00.

The Appellant submits that the figure of \$102.00 for the three coats in question was a qualified or conditional valuation and therefore not conclusive of the true value of the coats to Hecht's on January 16, 1969. Mrs. Margaret Reid, a buyer for the Hecht Department Store, testified that the coats, which had been retailing for \$45.00 a piece, were reduced prior to January 16, 1969 to sell at \$34.00 per coat. She indicated that the figure of \$34.00 per coat was determined by herself along with Mr. Stanley Fishman, her immediate supervisor. She further stated that the figure was an arbitrary one and that the reason for the reduction in price was prompted because Hecht wished to move the said coats out of stock (Tr. 18-19).

In other words, she and her supervisor believed that the price of \$34.00 would move the coats. She did indicate that the coats could have been reduced to sell at \$33.00 or \$99.00 for all three. Mention was made of the fact that the paramount consideration was to move the coats off the rack and not sell under cost (Tr. 20).

Quite clearly, there are two separate policy

considerations in determining the value of the coats in this case. First, was the ultimate policy consideration by Hecht to move the said coats off the rack and secondly, not to sell under cost. As indicated above, the coats in question apparently were not selling well and it was at the end of the winter season and inventory time was at hand. Hecht wished to get rid of the coats with the expressed policy not to sell under cost.

Hence, it is the position of the Appellant that given the above factors, \$75.00, or the original cost to Hecht's, was more realistically aligned to the true value of the coats on January 16, 1969. \$30.00 per coat would represent \$90.00 for all three coats or \$10.00 removed from the Grand Larceny figure of \$100.00. It would also represent a mark up of twenty percent for Hecht's over and above base cost. \$33.33 or \$99.99 for all three coats would be one cent shy of the needed \$100.00 figure of Grand Larceny. See 22 D.C. Code, Section 2201.

Essentially, the Appellant is arguing that the \$34.00 figure was arbitrary and did not constitute

a realistic approximation of the value of the coats to Hecht's on January 16, 1969. Perhaps, the true value fit in somewhere between the figure of \$25.00 and \$34.00, which would place the value to Hecht's somewhere between \$75.00 and \$99.00 for all three coats.

In Irrizari, the court held that the retail price, in this case \$34.00 per coat, is not necessarily conclusive if qualifying circumstances have been shown. Appellant submits that these qualifying circumstances had been shown at trial and that defense's motion for a judgment of acquittal should have been granted.

In Bailey v. United States, _____ U.S. App.D.C. _____ (1969) (Slip Opinion No. 21,428), the Court at page five of the slip opinion stated the rule governing the trial court's standard in determining whether the case should be submitted to the jury:

"Guilt according to a basic principle in our jurisprudence must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act on what would necessarily be only surmise and conjecture, without evidence."

The Appellant argues that given the circumstances

of the sale by Hecht and the elastic and amorphous nature of the value of the coats in light of evidence, the Government's case was too speculative and conditional to permit the jury to speculate, with the result that the motion for judgment of acquittal was erroneously denied. (See Bailey supra. at slip opinion page 11.)

ARGUMENT

II

THE COURT BELOW ERRED BY DENYING THE DEFENSE REQUEST TO INSTRUCT THE JURY ON THE OFFENSE OF ASSAULT AS A LESSER INCLUDED OFFENSE OF ASSAULT ON A MEMBER OF THE POLICE FORCE

In so far as count number two of the indictment is concerned covering the offense of Assault on a Member of the Police Force, the applicable code provision is 22 D.C. Code, Section 505(a), which in pertinent part states as follows:

"Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia,.....
.....while engaged in or account of the performance of his official duties, shall be fined not more than \$5,000.00 or imprisoned not more than five years or both."

The applicable section referring to Assault or Threatened Assault in a menacing manner is 22 D.C. Code, Section 504 and in pertinent part states as follows:

"Whoever unlawfully assaults or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be

imprisoned not more than twelve months, or both."

An obvious distinction between the code provisions is that Assault on a Member of the Police Force is a felony and carries a much severer penalty than the misdemeanor of Assault, whose maximum penalty is one year in jail and a \$500.00 fine.

In the instant case, the alleged assault on Detective Smythe at the entrance to the Eighth Street parking lot was, at best, ill defined. Detective Smythe indicated that Tuttle somehow flicked his arm backward and knocked the detective off his feet causing him to fracture the ring finger of his left hand on a metal pole. The detective described the alleged blow as a glancing one (Tr. 35). There was no indication that the Appellant pushed, kicked or grabbed Detective Smythe at any time (Tr. 37). What the case really broke down to was a flicking motion; but there was no testimony offered by the Government indicating where in particular Detective Smythe was struck.

When Detective Lanigan took the stand, the episode became even less defined as to the way and manner Detective Smythe was assaulted. Detective Lanigan

testified that he observed the Appellant throw Detective Smythe to the ground (Tr. 47). On the other hand, Detective Smythe had testified that such was not the case (Tr. 37).

Detective Lanigan further testified that there was a face to face confrontation between Smythe and Tuttle in the parking lot and both men were going round and round (Tr. 49). Detective Smythe had testified that the only movement was some kind of flicking motion backward on the part of Tuttle (Tr. 37).

Hence, the alleged assault in the case was very unclear.

Secondly, the Appellant contends that there was lack of meaningful communication between the detectives and himself to indicate that he clearly knew them to be police officers. The cruiser was unmarked and the detectives were in plain clothes at the time. There was nothing, save for the red light on top of the cruiser and the siren, to indicate that they were in fact police officers.

The Appellant contends that the lack of definition of the purported assault as against Detective Smythe,

as evidenced by the contradiction in testimony between the two detectives as to what actually happen and also the added factor of lack of meaningful communication by the detectives in relating who they were to the Appellant, should have prompted the Court below to grant the request for an instruction on Assault as a lesser included offense.

The standard jury instruction contained within the Criminal Jury Instructions published by the Junior Bar, is instruction number 53. Said instruction was requested by the Appellant in the Court below and denied.

Said instruction is as follows:

"The essential elements of the offense of assault, each of which the Government must prove beyond a reasonable doubt are:

- (1) That the defendant committed an assault on the complainant; and
- (2) That, at the time of the commission of the assault, he intended to do the acts which constitute the assault.

An assault is an attempt or effort, with force or violence, to do injury to the person of another, coupled with the apparent present ability to carry out such attempt. An assault may be committed without actually touching, striking, or committing

bodily harm on another."

See: Beausoliel v. United States, 71 U.S. App. D.C. 111, 114-115, 107 F. 2d 292, 295-296 (1939); Guarro v. United States, 99 App. D.C. 97, 99, 237 F. 2d 578, 580 (1956).

What is of special interest is that the above noted assault instruction does not differentiate as to who the complainant in an assault case need be. That is, it seems to indicate that a police officer could be an assaultee within the framework of the instruction.

The Appellant would contend that given the facts of the case with particular emphasis on contradictory testimony and qualitative weakness of the Government's case as concerns Assault on a Member of the Police Force, it was error for the Court below to deny the request for an instruction on assault as a lesser included offense.

References

1. The first of these is the fact that the Government has not yet decided whether or not it will accept the offer of the United States to purchase the surplus stocks of the Government.

...to behavior.

CONCLUSION

Appellant prays that this Court reverse his conviction, or in the alternative reverse and remand for a new trial.

Respectfully submitted,

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